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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

GRAND FORKS-TRAILL WATER USERS, INC.,
Appellant,

v.

WALTER R. HJELLE,
NORTH DAKOTA STATE HIGHWAY
COMMISSIONER,
Appellee.

On Appeal from the Supreme Court
of the State of North Dakota

JURISDICTIONAL STATEMENT

JOHN D. KELLY
VOGEL, BRANTNER, KELLY,
KNUTSON, WEIR & BYE,
LTD.
502 First Avenue North
P.O. Box 1389
Fargo, North Dakota 58107
(701) 237-6983
Attorneys for Appellant and
Counsel of Record

QUESTION PRESENTED

Can a state legislature burden all property adjacent to rural highways indefinitely with restrictions solely designed to limit the cost to the state of possible future highway expansion without paying just compensation as required by the Fifth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

The caption of the case in this Court contains the names of the parties to the proceeding in the North Dakota Supreme Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
LIST OF PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES CITED iv
JURISDICTIONAL STATEMENT 1
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2
STATEMENT OF THE CASE 2
THE QUESTION PRESENTED IS SUBSTANTIAL 5

I. This Court Has Previously Considered a Similar Case and There Found the State Action to be in Violation of the Taking Clause of the Fifth Amendment to the United States Constitution 5

II. The State Action in this Case is in the Nature of a Taking Because the Statutes have Permitted and Resulted in an Actual Physical Invasion and Occupation of an Easement Interest in Property 7

III. There is No Legitimate State Interest in this Case Which Supports an Exercise of the State's "Zoning" Power 9

IV. The Statutes Do Not Substantially Advance a Legitimate State Interest 11

V. The Statutes Impermissibly Impose a Detriment to a Private Property Interest Because They Serve an Enterprise Rather than an Arbitration Function of State Government 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Page

Agins v. City of Tiburon, 447 U.S. 225 (1980) 10, 11, 12

Armstrong v. United States, 364 U.S. 40 (1960) 18

Gordon v. City of Warren Planning and Urban Renewal Commission, 185 N.W.2d 61 (Mich. Ct. App. 1971), aff'd 199 N.W.2d 465 (1972) 13

Grand Forks-Traill Water Users v. Hjelle, 413 N.W.2d 344 (N.D. 1987) 1, 6, 7, 9, 12

Keystone Bituminous Coal Association v. DeBenedictis, _____U.S. _____, 107 S. Ct. 1232 (1987) 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 8, 9, 10

Maryland National Capital Park and Planning Commission v. Chadwick, 405 A.2d 241 (Md. 1979) 15, 16

Nollan v. California Coastal Commission, 483 U.S. _____, 107 S.Ct. 3141 (1987) 16, 17

Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613 (1935) 5, 6, 15

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 7, 8, 14, 18

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 13, 14

United States v. Causby, 328 U.S. 256 (1946) 8, 9

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 7

United States v. Virginia Electric and Power Company, 365 U.S. 624 (1961) 7

Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) 16
Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926).....12, 13
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).....19
Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).....17

Statutes

28 U.S.C. 1257(2) 2
North Dakota Century Code 24-01-42 .....1, 2, 3, 4, 6, 12, 13, 16
North Dakota Century Code 24-01-43 .....1, 2, 3, 4, 5, 6, 10, 12, 13, 15, 16

United States Constitution

Fifth Amendment 1, 2, 5, 20
Fourteenth Amendment.....1, 2, 20

Miscellaneous

Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964).....18

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On Appeal from the Supreme Court
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JURISDICTIONAL STATEMENT

Grand Forks-Traill Water Users, Inc. (hereinafter "Grand Forks-Traill"), the appellant, appeals from the final judgment of the Supreme Court of the State of North Dakota, sustaining the constitutional validity of North Dakota Century Code Sections 24-01-42 and 24-01-43 over Grand Forks-Traill's objection that these statutes violate the prohibition against taking property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court is reported at 413 N.W.2d 344 (N.D. 1987). The opinion and judgment are attached as Appendix A. The notice of appeal is attached as Appendix B. The trial court's two Memorandum Opinions are unpublished and are attached as Appendices C and D. The trial

court's Findings of Fact, Conclusions of Law and Order for Judgment is attached as Appendix E, and the Judgment is attached as Appendix F.

JURISDICTION

The North Dakota Supreme Court filed its opinion on September 29, 1987, reversing a favorable judgment for Grand Forks-Traill in the trial court. A notice of appeal to this Court was filed with the North Dakota Supreme Court on November 25, 1987. The appeal is timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "(N)or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

North Dakota Century Code Sections 24-01-42 and 21-01-43 are attached as Appendix G.

STATEMENT OF THE CASE

Grand Forks-Traill commenced this lawsuit in August, 1985 seeking a declaration that North Dakota Century Code Sections 24-01-42 and 24-01-43 are unconstitutional under the due process, equal protection and "taking" clauses of both the North

Dakota and United States Constitutions, and demanding damages for the costs associated with the replacement of its water pipelines caused by the invasion of its easement rights by the state highway department for a road widening project. The case was presented to the trial court based on stipulated facts. The trial court concluded that these statutes authorized a taking of private property for public use without just compensation, and violated state and federal equal protection guarantees. As a consequence, the trial court ordered judgment in favor of Grand Forks-Traill for the costs of replacing its pipeline, together with its attorneys fees and litigation costs.

Highway Commissioner Walter R. Hjelle (hereinafter "Highway Department") appealed to the North Dakota Supreme Court from the trial court's judgment. The North Dakota Supreme Court reversed, holding that North Dakota Century Code Sections 24-01-42 and 24-01-43 do not violate state and federal constitutional guarantees.

Briefly, the stipulated facts are as follows:

Grand Forks-Traill is a nonprofit corporation engaged in supplying water to residents of rural Grand Forks and Traill Counties of North Dakota. In 1971 and 1972, Grand Forks-Traill obtained easement rights from private landowners to construct a section of water line approximately 13 miles in length running parallel to State Highway 18 near Hatton, North Dakota. The water line was constructed outside the then-existing 66-foot highway right of way but within 100 feet of the center line of the highway. The water line did not occupy any of the highway right of way except where the line crossed under the highway at several locations. The highway department issued permits for those crossings. Grand Forks-Traill did not request a per-

mit, however, for the construction occurring outside the highway department's 66-foot right of way.

In 1984, the highway department acquired additional right of way and construction easements for planned improvements along Highway 18. The highway department's additional right of way and construction easements covered lands already subject to Grand Forks-Traill's water line easements.

In August, 1984, the highway department notified Grand Forks-Traill of its planned highway improvements in the area of Grand Forks-Traill's water line, indicating construction would commence in 1985. The highway department claimed the existing water line was within the highway department's newly acquired right of way and denied responsibility for any costs incurred by Grand Forks-Traill to remove its line as a result of the highway construction.

Grand Forks-Traill responded to the highway department's notification by advising the department that it was willing to remove any sections of water line crossing under the original highway right of way at its own expense, but indicated that the highway department should pay compensation for relocation of the water line constructed outside of the department's original right of way.

The highway department did not provide any compensation to Grand Forks-Traill for interfering with its easement rights or for the costs of relocating the water line. Instead, the department relied on North Dakota Century Code Sections 24-01-42 and 24-01-43 to deny the validity of Grand Forks-Traill's easements and to avoid paying just compensation. According to the provisions of Section 24-01-42, no one may construct an electric supply or communication line or pipeline within 100 feet of the center line of any state highway unless consent

to such construction is first obtained from the highway commissioner. The statute also requires that consent be obtained from the county commissioners before building within 75 feet from the center line of county roads. Section 24-01-43 provides that failure to obtain such consent results in the utility forfeiting any right to payment for removal of its facilities should such removal be required for highway expansion. No provision is made in these statutes for paying just compensation for this burden on every owner of property adjoining the thousands of miles of rural highways.

The highway department proceeded with its highway improvement plans in 1985. Because the highway department excavated several feet of the ground cover over the water line, Grand Forks-Traill was required to relocate its water line in order to avoid winter freezing. Grand Forks-Traill completed the relocation of its water line on October 30, 1985. The parties stipulated that the fair and reasonable cost of this relocation was $42,347.91.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. This Court has Previously Considered a Similar Case and There Found the State Action to be in violation of the Taking Clause of the Fifth Amendment to the United States Constitution.

This Court has once before, in a case which is factually and procedurally similar to this one, decided against a state which attempted to avoid the cost of a pipeline relocation which was made necessary because of highway expansion. *Panhandle Eastern Pipeline Co. v. State Highway Commission,* 294 U.S. 613 (1935). *Panhandle* involved a challenge to a Kansas statute said to authorize an order of

the State Highway Commission requiring a utility to remove its pipelines at its own expense, even though the lines were located on the utility's right of way. As in this action, the highway commission later acquired this same right of way from the landowners but without obtaining the consent of the pipeline company to use its right of way easement. *Id.* at 617. The Kansas Supreme Court upheld the highway commission's order, stating that the commission could enforce reasonable regulations under its police power to make public travel on the highways safe. *Id.* at 617-18. This Court rejected this conclusion and reversed, noting that the pipelines did not pose a serious danger to the public. The Court commented: "Like any other lawful structure these lines may have presented obstacles to construction of the proposed highways; but this might have been overcome by condemnation proceedings." *Id.* at 619. The Court went on to observe that the police power does not provide unrestricted authority to accomplish whatever the public may presently desire. *Id.* at 622.

The North Dakota court distinguished *Panhandle* simply by stating that it "did not involve pipelines installed after the enactment of a regulation similar to 24-01-42 and 24-01-43, N.D.C.C." *Grand Forks-Traill Water Users v. Hjelle,* 413 N.W.2d 344, 347 (N.D. 1987). The Kansas and North Dakota statutes are similar, however, in the sense that both allow the highway department to invade the pipeline easement for the benefit of the general public without compensating the pipeline company for the losses suffered as a direct result of that invasion. Also, in both cases, the statutes which under state law enabled the highway department to put the burden and expense of relocation on the pipeline owner were passed before the acquisition of the pipeline easement at issue. *See Panhandle,* 294 U.S. at 615, 616.

II. The State Action in this Case is in the Nature of a Taking Because the Statutes have Permitted and Resulted in an Actual Physical Invasion and Occupation of an Easement Interest in Property.

In upholding the constitutionality of the statutes, the North Dakota Supreme Court placed a great deal of significance on the fact that "the statutes do not prohibit all or substantially all reasonable uses of the regulated property as a whole." *Grand Forks-Traill Water Users,* 413 N.W.2d at 347. However, this Court has never said that the finding of a taking depends upon interference with "all or substantially all reasonable uses" of property. This would be tantamount to saying that a property interest which contains less than all of the sticks in the "bundle of rights" is something less than property, a notion specifically rejected in *United States v. Security Industrial Bank,* 459 U.S. 70, 76 (1982).

The interest held by Grand Forks-Traill in the property subject to these statutes is admittedly not a fee simple interest, but is a dominant easement giving Grand Forks-Traill the right to lay and maintain its water line. This Court has specifically held that an easement is property, the taking of which is compensable under the Fifth Amendment. *United States v. Virginia Electric and Power Company,* 365 U.S. 624 (1961).

What these statutes can and have done is enable the State to invade and occupy an easement interest which is deserving of protection. Even the *Penn Central* Court, which the North Dakota court cited for its proposition that it is the effect of the restriction on the property "as a whole" which must be considered, conceded that "(a) 'taking' may more readily be found when the interference with

property can be characterized as a physical invasion by government...than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978). In making this statement, the *Penn Central* Court referred to *United States v. Causby,* 328 U.S. 256 (1946) as the type of case where a taking may more readily be found. *Penn Central,* 438 U.S. at 124.

In pointing to *Causby* as an example of a governmental infringement which required compensation, the Court singled out a situation which was quite similar to the one presented here. In both cases the government action was not designed to adjust benefits and burdens or to arbitrate between competing private property rights. Rather, the government action in both instances served to create a purely public benefit (the creation of a transportation corridor) to the economic detriment of individual property rights directly affected by that public function. It is also significant to this case that the overflights involved in *Causby* did not confiscate all beneficial uses of the property below, and that compensation was required even though what the government had taken was, in effect, only an easement. *Causby,* 328 U.S. at 259.

Since *Penn Central,* this Court has said that in some cases the character of government action may be more than just one factor to be considered. The rule now appears to be that if there is a physical intrusion which "reaches the extreme form of a permanent physical occupation... 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426 (1982).

This seems to be so "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434, 435.

Here, it is undisputed that the statutes in question can and have enabled the highway department to physically come onto an easement owned by Grand Forks-Traill and disrupt its pipeline, imposing an uncompensated economic detriment on the easement owner. This is sufficient to constitute a "taking" under the *Loretto* and *Causby* standards even though other possible uses or interests in the property were not similarly confiscated. It is interesting to note that the statutes at issue only impose relocation expense burdens on utilities constructing facilities near highway rights of way and not on others who construct other structures or use the land in a different manner. The State has apparently recognized that it cannot expand a highway without compensating these other holders of property interests. Grand Forks-Traill had a property interest which was just as surely invaded as was any other interest in the property. It also had a property interest which was invaded just as surely as the property involved in *Causby* and *Loretto.* Grand Forks-Traill fails to see any constitutional principle under which the State of North Dakota is entitled to single out its property interest as undeserving of compensation.

III. There is No Legitimate State Interest in this Case Which Supports an Exercise of the State's "Zoning" Power.

In spite of the fact that the State actually came on to a private easement to widen the highway, the North Dakota court chose to characterize this case as not involving "a permanent physical occupation." *Grand Forks-Traill Water Users,* 413

N.W.2d at 348. Even if the invasion and occupation by the highway department is ignored, however, the statutes themselves which enabled the highway department to act are constitutionally flawed as improper land use regulations.

This Court has established a framework to use in analyzing whether a land use regulation is a constitutional exercise of the police power. The Court has explained that such a regulation must "substantially advance legitimate state interests." *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980). Therefore, a threshold question is whether the state interest advanced by the regulation serves a legitimate land use concern or merely expedites the government's acquisition of private property for public use.

In this case, the North Dakota legislature made the essential purpose of these statutes clear by referring to "highway expansion" as the basis for not paying relocation expenses. *N.D. Cent. Code* § 24-01-43. The highway department acknowledged that the interest served by these statutes is the economizing of highway reconstruction costs. In its brief below, the highway department stated: "The legislature's intent to promote economic progress of the state is achieved by economizing future widening or relocation of the highways. The setback protects the State's taxpayers from having to expend substantial sums of money on what are in effect relatively short-lived improvements." Appellant's Brief at 22. While highway improvement projects clearly serve the public interest and support the use of the State's eminent domain power, such public works projects can not be subsidized by infringing on private property interests under the guise of invoking the police power for land use regulation. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 425 (1982).

This Court has found some state interests which do tend to, at least partially , justify a governmental intrusion into private property rights without any provision of compensation for the intrusion. The prevention of "activities similar to public nuisances" is one such legitimate state interest. *Keystone Bituminous Coal Ass'n v. De Benedictis,* _____ U.S. _____, _____, 107 S. Ct. 1232, 1246, (1987). The protection of residents "from the ill effects of urbanization" is another. *Agins v. City of Tiburon,* 447 U.S. at 261. Here, however, the private use being restricted is a buried water line. Such a line has no noxious or dangerous effect from which the public needs protection. The State's purpose in putting the regulatory burden on the utility is not to protect the public from any ill effects, but rather to protect the public treasury from expenses it should rightfully bear.

Grand Forks-Traill is not aware of any case where a regulation limiting private development rights was upheld when the clear and only intent of the government was to save the general taxpayers from the costs involved in obtaining private property for a public use. This Court stated in *Agins* that "(the) determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Id.* at 260. It seems clear that when it comes to public works projects, such as the expansion of a state highway, it is the general public rather than specific individuals who should bear the burden. Consequently, the State's interest here is not legitimate.

IV. The Statutes Do Not Substantially Advance a Legitimate State Interest.

While the North Dakota Supreme Court apparently recognized that the legislature's pri-

mary purpose in enacting sections 24-01-42 and 24-01-43 was to save the State money, it implies that the statutes are permissible because they also serve broader considerations such as "efficient highway planning, safety, and the public welfare." *Grand Forks-Traill Water Users,* 413 N.W. 2d at 347. However, even if there was some permissible safety or planning purpose involved, this Court still requires that the regulation "substantially advance" the legitimate purpose. *Agins v. City of Tiburon,* 447 U.S. at 260. These statutes not only do not bear a "substantial" relationship to a permissible purpose, there is not even a rational relationship to any purpose other than the impermissible one of putting a public burden on private individuals.

The North Dakota Supreme Court has suggested that these statutes are to be scrutinized in the same way as is a zoning ordinance. *Grand Forks-Traill Water Users,* 413 N.W.2d at 346. However, the restrictions on utility development adjacent to rural highway rights of way created by sections 24-01-42 and 24-01-43 should not be viewed as a proper zoning regulation. In *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) this Court recognized that the issue of whether a zoning restriction served a legitimate interest is dependent on the circumstances to which it is applied. There the Court observed:

> "A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. . . .Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building

> or of the thing considered apart, but by considering it in connection with the circumstances and locality."

Id. at 387, 388.

It is clear that the "circumstances and locality" addressed by sections 24-01-42 and 24-01-43 bear only a superficial resemblance to valid municipal setback ordinances. Unlike municipal setback ordinances, the statutes limiting construction of utility facilities within 100 feet of the highway centerline are not designed to deal with the reciprocal rights and duties of property owners living in a complex urban society. Instead, the legislature enacted these statutes simply to reduce the cost of possible future highway expansion. The distinction between valid zoning and impermissible taking was aptly articulated in *Gordon v. City of Warren Planning and Urban Renewal Commission,* 185 N.W.2d 61, 69 (Mich. Ct. App. 1971), aff'd 199 N.W.2d 465 (1972), wherein the court stated:

> "The conceptual difference between requiring a yard setback for light and air (which the State need not pay for) and requiring that land be set aside for a public use (which, before it can be put to that use, the State must pay for) may not be readily explicable. It is, nevertheless, perfectly clear that there is a difference, a constitutional difference, between telling a property owner that he must provide space between his building and that of his neighbor and telling him to set aside land for possible future condemnation."

Id.

Justice Holmes in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) suggested that the constitutional difference between a land use regulation which is a taking and one which is not is that the latter not only imposes a burden but also provides

an "average reciprocity of advantage" to those property owners who are subject to it. *See Id.* at 415. Chief Justice Rehnquist has explained how those subject to a valid zoning ordinance receive a reciprocal advantage as follows:

> "(A)ny such abstract decrease in value (resulting from a zoning restriction) will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another.

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 139, 140 (1978) (Rehnquist, J. dissenting).

Here, it is clear that the owners of utility easements along state highways are subject to an economic burden imposed by the statutes at issue. It is far from clear, however, what reciprocal advantage they receive when the same burden is placed only upon other abutting utility easements. A property owner who is subject to the burdens of a valid zoning ordinance gets the reciprocal advantage which comes with having his property situated in an open, safe, healthy, convenient and well planned environment. These statutes, unlike a valid zoning regulation, are designed only to impose a burden on the property interests subject to them. They are not designed to confer any such reciprocal benefits.

That the statutes at issue fail to serve any health, safety or planning interest is abundantly clear when one looks at their operational effect. While the statutes require a utility to obtain the consent of the highway department before it lays a

pipeline in the privately owned easement, there are no rules or regulations promulgated relating to the circumstances or conditions under which consent will or will not be given. It would seem that if there was any sort of legitimate health or safety purpose behind these statutes, there would have been some formal procedures or sanctions attached to guard against dangers to health, safety or the general welfare at the earliest possible time. Here, however, the legislature only provided for a forfeiture of compensation in the event of highway expansion, but provided no penalty for failure to obtain approval in any other case. *N.D. Cent. Code* § 24-01-43. If these statutes were truly founded upon a concern for the public welfare and safety of all citizens, then surely the law would have provided some penalty or procedure to require a utility to remove its facilities if a safety concern arose prior to highway expansion. The fact is, however, that any safety concerns in regard to pipelines buried along or underneath highways are insignificant and cannot justify a requirement for uncompensated removal. *Panhandle Eastern Pipeline Co. v. State Highway Commission*, 204 U.S. at 619.

The statutes give the highway commissioner the unrestricted power to refuse consent to utility construction indefinitely. Because of this indefinite period of application, the statutes also fail as a reasonable planning measure. The statutes are not like "official map" ordinances which may limit development in areas of *planned* road and street improvements. While "official map" acts may be constitutional if reasonable in scope and duration, they violate constitutional guarantees if not properly limited or if their purpose is to hold down property values to reduce future condemnation costs.

In *Maryland National Capital Park and Planning Commission v. Chadwick*, 405 A.2d 241 (Md. 1979),

the court held that a precondemnation reservation restricting for three years development of land planned for possible future public recreation purposes was unreasonable in its duration and severity and unconstitutionally deprived landowners of their property without just compensation. *Id.* at 242-50. Similarly, in *Urbanizadora Versalles, Inc. v. Rivera Rios,* 701 F.2d 993 (1st Cir. 1983), the court held that an official map reservation of land for future highway improvement which froze development of the plaintiff's land for 14 years exceeded "every available indication of what the duration of a reasonable and constitutional freeze might be." *Id.* at 997.

By enacting sections 24-01-42 and 24-01-43, the legislature did not freeze development for three years or 14 years, but rather gave the highway commissioner the unrestricted authority to prevent certain types of development along public highways indefinitely, whether or not the highway department has an imminent planned use for the land. Here, the highway department road widening project arose 12 years after Grand Forks-Traill built its pipeline. Consequently, it cannot even be convincingly argued that there was a legitimate "planning" interest served as the statutes are not even remotely tailored to such a purpose.

This Court very recently had occasion to hold up the taking clause as a shield against an arbitrary use of the police power when it found that a building permit condition which required a property owner to grant an easement across his property for use by the general public did not advance a legitimate state interest even under "the most untailored standards." *Nollan v. California Coastal Commission, 483* U.S. _____ _____, 107 S. Ct. 3141, 3148 (1987). In *Nollan,* the Court suggested

an analogy which is also pertinent here. The Court said that even though a state has a legitimate interest under its police power to forbid the shouting of fire in a crowded theater, it would not be permissible to attach a condition whereby one could get a dispensation from the law by contributing $100 to the state treasury. *Id.* Likewise, here, even if the State could demonstrate a legitimate health or safety interest in regulating development on private property along a public highway, the regulation itself bears no rational relationship to the state interest supposedly served as the penalty for noncompliance only applies if the highway department wishes to expand the highway. This fact exposes the statutes for what they are — a not very subtle use of regulatory leverage to reserve private property for a public use. This Court would not permit the State of California to exercise such raw leverage in *Nollan,* and North Dakota should not be permitted to do so here.

V. The Statutes Impermissibly Impose a Detriment to a Private Property Interest Because They Serve an Enterprise Rather than an Arbitration Function of State Government.

This Court has commented on how difficult it is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson Co. Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, _____, 105 S.Ct. 3108, 3124, (1985). However, one commentator, in an article which has frequently been cited in this Court's "taking" cases, has suggested a rule which does much to clarify the issue generally, and is particularly apt in this specific case. The rule is stated as follows:

> "(W)hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of governmental activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required."

Sax, *Takings and the Police Power,* 74 Yale L.J. 36, 67, (1964).

This Court has never expounded this exact rule. However, it has noted a distinction between action taken by a government in its "enterprise capacity" and that which "arises from some public program adjusting the benefits and burdens of economic life..." *Penn Central v. City of New York,* 438 U.S. at 124, 135.

Here, it is very clear that the State's interest in passing these statutes was not to "adjust the benefits and burdens" among competing private economic interests. The only purpose which is served by these statutes is to grant the State an economic advantage in its enterprise capacity by enabling it to reduce future condemnation costs by shifting those costs to owners of private property rights. The essential intent of the Taking Clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). Therefore, the only interest the statutes advance is an impermissible one.

The danger involved when a state acts to gain an economic advantage which advances only an enter-

prise interest is that, in obtaining such an advantage, the state is not merely an impartial arbitrator between competing interests but is actually itself an interested party. In such a situation a conflict of interest might result and there is the potential for the state to act arbitrarily in advancing its own general interests at the expense of specific individuals. In a case which is factually very different from this one but quite similar in principle, this Court has commented on such danger, saying:

> "(A) State, by *ipse dixit,* may not transform private property into public property without compensation...This is the very thing that the Taking Clause of the Fifth Amendment was meant to prevent. That clause stands as a shield against the arbitrary use of governmental power."

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

CONCLUSION

In enacting the statutes at issue, the State has conferred upon the highway department the power to regulate, control, limit or even forbid the lawful use of privately held property rights and to ultimately invade this property without the necessity of providing compensation. What makes the exercise of this power impermissible is that the statutes are not designed to protect the public from any danger to health or safety. Nor is the power used to arbitrate among competing, incompatible land uses in order to arrive at the common good. Rather, the true function of these statutes is to confer an economic benefit upon a purely public enterprise by holding down the cost of possible future public works projects. The way these costs are held down is by placing a substantial portion of the expense

on individual property owners. In this case, Grand Forks-Traill was forced by the State to bear a burden which, according to the principles of fairness and justice underlying the Taking Clause, should properly have been borne by the public at large. Consequently, this Court should grant a hearing to consider whether the North Dakota statutes and the state actions taken pursuant to them are violative of the Fifth and Fourteenth Amendments to the United States Constitution.

Dated this 23rd day of December, 1987.

Respectfully submitted.

JOHN D. KELLY
Vogel, Brantner, Kelly, Knutson,
Weir & Bye, Ltd.
502 First Avenue North
P.O. Box 1389
Fargo, North Dakota 58107
(701) 237-6983
Attorneys for Appellant and
Counsel of Record

APPENDIX A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Grand Forks-Traill
Water Users, Inc.,
Plaintiff and Appellee

v.

Walter R. Hjelle,
North Dakota State
Highway Commissioner,
Defendant and Appellant

Civil No. 870035

(Filed September 29, 1987)

Appeal from the District Court of Traill County, East Central Judicial District, the Honorable Norman J. Backes, Judge.

REVERSED.

Opinion of the Court by Erickstad, Chief Justice.

Vogel, Brantner, Kelly, Knutson, Weir & Bye, P.O. Box 1389, Fargo, ND 58107, for plaintiff and appellee; argued by John D. Kelly.

Steven F. Lamb, Assistant Attorney General, N.D. State Highway Department, 600 East Boulevard Avenue, Bismarck, ND 58505-0700, for defendant and appellant.

Grand Forks-Traill Water Users v. Hjelle
Civil No. 870035

ERICKSTAD, Chief Justice.

Walter R. Hjelle, North Dakota State Highway Commissioner (Commissioner), appealed from a district court judgment awarding Grand Forks - Traill

Water Users, Inc. (Traill), compensation, attorney fees, and costs in its action for damages for relocating a water line. We reverse.

In 1971 and 1972 Traill obtained easements from private landowners to construct a water line parallel to State Highway 18 near Hatton, North Dakota. The line was constructed outside the then-existing highway right of way, but within 100 feet of the centerline of the highway. Traill did not request the Commissioner's consent for the location of the water line except where the line crossed under the highway. The Commissioner issued permits for those crossings.

In 1984 the highway department acquired additional right of way and construction easements, including land upon which Traill had its water line easements, for planned highway improvements along State Highway 18. Because the highway department removed several feet of the ground cover over the water line in making the highway improvements in 1985, Traill was required to relocate its water line to avoid frost damage.

Relying on §§ 24-01-42[1] and 24-01-43[2] N.D.C.C., both enacted before Traill constructed the water line, the Commissioner refused to compensate Traill for expenses incurred in relocating the water line. Traill sued for a declaration that the statutes are unconstitutional, indemnity for the costs of replacing the water line, and attorney fees. The trial court concluded that the statutes are unconstitutional and that Traill's property had been taken or damaged without compensation, and it awarded Traill compensation, attorney fees, and costs.

Resolution of this appeal requires us to address two issues: (1) whether §§ 24-01-42 and 24-01-43, N.D.C.C., constitute reasonable land-use regulations not requiring just compensation; and (2) whether

those statutes violate constitutional guarantees of equal protection.

"A statute enjoys a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution." *Richter v. Jones,* 378 N.W.2d 209, 211 (N.D. 1985). A statute will be construed, if possible, so that it will pass constitutional muster. *In re Kupperion,* 331 N.W.2d 22 (N.D. 1983). Any doubt as to the constitutionality of a statute must be resolved in favor of its validity. *Snortland v. Crawford,* 306 N.W.2d 614 (N.D. 1981). "Courts will construe statutes so as to harmonize their provisions with the Constitution if it is possible to do so, to the end that they may be sustained." Syllabus 3, *Hjelle v. Sornsin Construction Co.,* 173 N.W.2d 431 (N.D. 1969).

1. regulation or taking

Article I, § 16, N.D. Const., provides that "(p)rivate property shall not be taken or damaged for public use without just compensation." It is broader than the guarantee of the Fifth Amendment to the United States Constitution. *Donaldson v. City of Bismarck,* 71 N.D. 592, 3 N.W.2d 808 (1942). It "was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable." *Id.,* Syllabus 1.

In *Rippley v. City of Lincoln,* 330 N.W.2d 505, 507 (N.D. 1983), we explained the state's power to regulate land use and the point at which regulation becomes a taking:

> "The state, acting through its police power, has broad authority to enact land use regulations without compensating landowners for restrictions placed upon their property,

> and a zoning ordinance, one type of land use regulation, does not constitute a taking for which compensation must be paid merely because it diminishes the value of the regulated property or disallows the best and highest use of the property. *Eck v. City of Bismarck*, 283 N.W.2d 193 (N.D. 1979); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741 (N.D. 1978). However, governmental regulation which prohibits all or substantially all reasonable use of the regulated property constitutes a taking of the property for public use which entitles the landowner to just compensation through an inverse condemnation action. See, *Kraft v. Malone*, 313 N.W.2d 758 (N.D. 1981)."

In determining whether a restriction constitutes a taking, courts look to the effect of the restriction on the parcel of land as a whole, rather than to the effect on individual interests in the land. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, _____ U.S. _____, _____, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472, 496 (1987) (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130-131, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631, 652 (1978):

> " ' "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole* -- here the city tax block designated as the "landmark site." ' "

In our view, prohibiting a landowner, and thus his lessee or grantee, from constructing "any electrical supply or communication line, gas, oil or water or other pipeline" within 100 feet of the center line of a state highway without the Commissioner's consent (§ 24-01-42, N.D.C.C.) upon pain of removal "at the expense of the utility, when such removal is required for purposes of highway expansion" (§ 24-01-43, N.D.C.C.) "does nothing more than regulate one particular future use of property while leaving available to the property owner all other uses." *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741, 758 (N.D. 1978). Thus, the statutes do not prohibit all or substantially all reasonable uses of the regulated property as a whole.

Traill argues that "it can hardly be argued that the 100-foot restriction is based on any safety considerations or that it has a reasonable relationship to any other matter of general public welfare" and that "the legislature enacted these statutes simply to reduce the cost of possible future highway expansion." While safety considerations may not be as great in the case of a buried water line as with some of the other types of lines restricted by the statutes, we are not prepared to say the statute is "clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals or public welfare." *Soderfelt v. City of Drayton,* 79 N.D. 742, 752, 59 N.W.2d 502, 507 (1953). The statute tends to promote sound and efficient highway planning, safety, and the public welfare. In limited circumstances, reducing the cost of possible future highway expansion is a permissible objective. See *State v. Manders,* 2 Wis.2d 365, 86 N.W.2d 469, 473 (1957) ("protection of economic interests of the general public falls within the scope of promotion of the general welfare, and thereby affords a basis for the exercise of the police pow-

er"), *See also Vangellow v. City of Rochester,* 190 Misc. 128, 71 N.Y.S.2d 672, 678 (1947) (quoted by the court in *State v. Manders, supra)* where the court said:

> "(P)rovided that it can be accomplished without materially diminishing the value or usefulness of the premises, constitutional law does not prevent the City, in the exercise of the police power pursuant to the enabling act, from requiring that the new building be erected in such manner as to minimize the damage thereto which will result when and if, in the future, the City shall decide to widen West Main Street."

It does not appear to us that the 100-foot restriction on the installation of utility lines has materially diminished the value or usefulness of the premises as a whole. As in *State v. Manders, supra,* 86 N.W.2d at 475, "(w)e cannot spell out...any legislative motive to depress existing property values."

Traill's reliance on cases such as *Magnolia Pipe Line Co. v. City of Tyler,* 348 S.W.2d 537 (Tex. Civ. App. 1961); *Arkansas La. Gas Co. v. La. Dept. of Highways,* 104 So.2d 204 (La. App. 1958); and *Panhandle Eastern Pipe Line Co. v. State Highway Comm'n,* 294 U.S. 613, 55 S.Ct. 563, 79 L.Ed. 1090 (1935) is misplaced. Unlike this case, those cases did not involve pipelines installed after the enactment of a regulation similar to §§24-01-42 and 24-01-43, N.D.C.C. We also do not deem *Nollan v. California Coastal Comm'n,* 483 U.S. _____, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. _____, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), to be particularly helpful in resolving this issue. While those are important decisions, the underlying facts in them are readily distinguishable in

significant respects. In *Nollan*, the conditioning of a building permit upon Nollan's "transfer to the public of an easement across their beachfront property" (107 S.Ct. at 3143) was held to be a "permanent physical occupation" (107 S.Ct. at 3145) constituting a taking requiring compensation. The instant case does not involve a permanent physical occupation. In *First English*, the complaint alleged "that the ordinance in question denied appellant *all use of* its property." (107 S.Ct. at 2389). The statutes involved in this case do not deny all use or substantially all use of the property as a whole.

We conclude that Traill has not shown that §§24-01-42 and 24-01-43, N.D.C.C., effect an unconstitutional taking of property without just compensation. Under the circumstances of this case, those statutes constitute reasonable land-use regulations not requiring compensation for removal of a water line which was installed without the consent of the Commissioner.

2. equal protection

Traill argues that §§ 24-01-42 and 24-01-43, N.D.C.C., deny equal protection because the classification they establish restricts the placement of utility lines within 100 feet of state highways, but "places no similar restrictions on the construction of fences, buildings, television towers, industrial facilities, or even a private road."

A classification does not deny equal protection "if any state of facts reasonably can be conceived that would sustain it." *Newman Signs, Inc. v. Hjelle, supra*, 268 N.W.2d at 758 (quoting *Signal Oil & Gas Co. v. Williams County*, 206 N.W.2d 75, 83 (N.D. 1973). "Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Syllabus 4, *State v. Gamble Skogmo, Inc.*, 144

N.W.2d 749 (N.D. 1966). "Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial re-examination." Syllabus 6, *State v. Gamble Skogmo, Inc., supra.* Preventive legislation need not work a perfect cure. *Snyders Drug Stores, Inc. v. North Dakota State Bd. of Pharmacy,* 219 N.W.2d 140 (N.D. 1974).

The Legislature could reasonably have determined that the frequency with which utility lines are constructed near highways created the problem most in need of reform. The Legislature could also reasonably have determined that restricting the construction of utility lines would not materially diminish the value or usefulness of adjacent property, but that similar restrictions on other types of construction might materially diminish the value or usefulness of the property, thus resulting in a compensable taking unnecessarily costly to the state and unnecessarily detrimental to the landowner. This might be especially true of such things as fences and buildings. We are not persuaded that Traill has met its burden of establishing that the classification bears no reasonable relation to the legislative purpose of regulating land use along highways to promote sound and efficient highway planning, safety, and the public welfare without effecting compensable takings of property.

Traill contends that §§ 24-01-42 and 24-01-43, N.D.C.C., "unconstitutionally delegate power to the highway commissioner to arbitrarily interfere with private property rights without due process of law" because they "provide no standards to limit the highway commissioner's power to refuse consent nor do they contain any time limitations or other safeguards to protect the private property interests affected."

Because Traill did not seek the Commissioner's consent, the lack of explicit standards or safeguards in the statutes[1] has had no effect on Traill. In *Detlaff v. Board of County Comm'rs of Ward County*, 136 N.W.2d 835, 839 (N.D. 1965), this court said:

> "The respondents have not followed the procedure provided in the zoning resolution for a building permit, and until such application for a building permit has been presented to and rejected by the Board of County Commissioners the respondents cannot say that they have been harmed or adversely affected by the particular feature of the resolution alleged to be in conflict with the Constitution."

Because Traill did not request the Commissioner's consent, it cannot say that it has been harmed or adversely affected by the lack of standards or safeguards asserted to be unconstitutional and accordingly, we deem it unnecessary to determine this issue.

The judgment is reversed.

Ralph J. Erickstad, C.J.
H.F. Gierke, III
Herbert L. Meschke
Dennis A. Schneider, D.J.

SCHNEIDER, D.J., sitting in place of LEVINE, J., disqualified.

[1] "*24-02-42. Construction of utility facility--Limitation.*--No person, firm or association shall construct any electrical supply or communication line, gas, oil or water or other pipeline parallel to and within one hundred feet (30.48 meters) of the center line of any state highway right of way or within seventy-five feet (22.86 meters) of the center line of any county highway right of way without first obtaining the consent of the highway commissioners except that such prohibition shall not apply to highways or streets located within areas platted as townsites or additions and subdivisions thereof."

[2] "*24-01-43. Utility facility--Removal.*--Any utility or transmission line hereinafter constructed contrary to the provisions of section 24-01-42 shall be removed at the expense of the utility, when such removal is required for purposes of highway expansion."

[3] Clear legislative standards may not be necessary if there are other adequate procedural safeguards. *See Trinity Medical Center v. North Dakota Board of Nursing*, 399 N.W.2d 835 (N.D. 1987).

Civil No. 870035

GRAND FORKS-TRAILL WATER USERS v. HJELLE

VandeWalle, Justice, concurring in result.

I concur in the result reached by the majority opinion reversing the judgment. I have doubts concerning the standing of Traill to challenge Sections 24-01-42 and 21-04-43, N.D.C.C., or whether it has waived the right to question the constitutionality of the statutes by its failure to raise the constitutional question at the earliest opportunity. I would therefore prefer to leave for another day the issues of whether the statutes constitute reasonable land-use regulations not requiring compensation and whether or not those statutes violate constitutional guarantees of equal protection. I recognize that the issues of standing or waiver were addressed only peripherally by the parties and therefore not at all by the majority opinion.

As the majority opinion observes, Traill obtained the easements from private landowners in 1971 and 1972. Traill did so without requesting the Commissioner's consent for the location of the water line except where the line crossed under the highway. The facts were submitted to the trial court by stipulation of the parties and we are left to speculate whether the failure of Traill to request the permission of the Commissioner was due to its belief that

the statute is unconstitutional; that it was simply unaware of the statutory requirement; or that it was aware of the statutory requirement but chose to not request permission in the belief that it would not be granted and that if the occasion arose in which the highway was to be widened the statute would be challenged as to its constitutionality at that time.

My concern as to Traill's position in this case is perhaps exemplified by the discussion in the majority opinion of the first issue, i.e., whether the statutes involve a reasonable regulation or a taking. The opinion appears to address the issue from that of the landowner and concludes that because the statutes do not prohibit all or substantially all reasonable uses of the regulated property as a whole, decisions such as *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. _____, 107 S.Ct. 2378, 91 L.Ed.2d 250 (1987), do not apply. Although I might agree with that conclusion insofar as the landowner's position is concerned, it is not the landowner but rather the easement owner who is challenging the statutes. The statute does prohibit all use by utility-easement owners in the area proscribed.[1]

But Traill cannot invoke the rights of the farmer-landowner from whom the easement was acquired. 16 C.J.S., *Constitutional Law,* § 66(a). As an example, in its brief Traill argues that "The initial construction of a water line will necessarily prevent farmers from cultivating crops from the edge of the highway right of way to the location of the water line during construction. If the line is built 40 or 50 feet further into each farmer's field, this may result in substantial crop loss. Furthermore, additional crop loss will result whenever the water line is in need of maintenance as equipment must be moved deeper into the farmer's field. Placement of utility

poles create even more problems for farmers who must farm around these obstructions. As a consequence, farmers are reluctant, if not totally unwilling , to grant easements to utilities except along borders of their fields."

However, a party may not challenge the constitutionality of a statute on the ground that someone other than itself might be harmed. E.g., *First Bank of Buffalo v. Conrad,* 350 N.W.2d 580 (N.D. 1984). Traill may not, therefore, raise the concerns of the farmer-landowners of this State who are not parties to this action, particularly the argument relative to utility poles since the easements in question involved buried water lines.

Although the argument may appear to be tailored to Traill's concerns, i.e., that farmers are reluctant to grant easements to utilities except along the borders of their fields and this statute would force Traill to acquire easements farther into fields when farmers are reluctant to grant easements to utilities except along the borders of their fields, that argument is not persuasive in this instance because we do not know if the Commissioner would have denied the permits if Traill had requested them pursuant to the statute. Furthermore, Traill, as the result of legislative enactment, has the power of eminent domain. Sec. 32-15-02, N.D.C.C. In any event, it appears Traill's argument in this regard is more properly addressed to the legislative branch of government.

Nor is Traill in a position to argue, as it does, that the statutes deny due process because of lack of adequate standards limiting the Commissioner's discretion. Traill did not apply for permission to install the line and therefore the standards or lack thereof limiting the Commissioner's discretion in granting or denying the permit are not significant to Traill's status in this case. See *State Dept. of*

Nat. Resources v. Olson, 275 N.W.2d 585 (Minn. 1979).

Although this court has previously held that one who seeks to enjoy the benefits under a law cannot, in the same proceedings, question the constitutionality of the Act under which he so proceeds, even in the event that benefits are ultimately denied *Quist v. Best Western Intern., Inc.,* 354 N.W.2d 656 (N.D. 1984), that holding should not apply where the statute, as here, creates a requisite to certain action such as the installation of an underground water line within 100 feet of the center of a highway. The statute prohibits the installation of a line without the approval of the Commissioner. Not only should a party who requests permission and is denied be entitled to challenge the constitutionality of that law at that time, such action should be a requisite to a challenge. The general rule is that a constitutional question must be raised at the earliest opportunity or it will be deemed waived. 16 Am.Jur.2d., *Constitutional Law,* 206. The proper time to raise the issue was at the time the lines were installed contrary to the statute.

Gerald W. Vande Walle
Dennis A. Schneider, D.J.

GRAND FORKS-TRAILL WATER USERS v. HJELLE, Civil No. 870035

Concurrence in result by VandeWalle, Justice

Footnote, p. 3

[1] Presumably there would be little question that Traill was entitled to compensation if it acquired an easement from a private landowner prior to the time Section 24-01-42 was enacted and was subsequently required to remove its water lines. On the other hand, where utility lines are installed on public rights-of-way, the State may order the utilities to relocate such facilities at the expense of the utilities. *Northwestern Bell Telephone Company v. Wentz,* 103 N.W.2d 245 (N.D. 1960). North Dakota, has however, allowed reimbursement for those expenses. *Id.*; Sec. 21-01-41, N.D.C.C. Here, the easement was acquired prior to the time the State acquired any right-of-way.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

File No. 870035

Appeal from the District Court of Traill County

Grand Forks-Traill
Water Users, Inc.,

Plaintiff and Appellee

v.

Walter R. Hjelle, North
Dakota State Highway
Commissioner,

Defendant and Appellant

This appeal having been heard by the Court at the May, 1987, term before:

The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. VandeWalle, the Honorable H. F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Dennis A. Schneider, District Judge, Justices;

and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the court below be and the same is hereby REVERSED.

It is further ordered and adjudged that Appellant have and recover from the Appellee the costs and disbursements on this appeal, to be taxed and allowed in the court below.

Dated: September 29, 1987.

By the Court:
Ralph J. Erickstad
Chief Justice
North Dakota Supreme Court

Attest: Luella Dunn
Clerk of the Supreme Court

APPENDIX B

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Grand Forks-Traill Water Users, Inc.,

Plaintiff-Appellee,

vs.

Walter R. Hjelle, North Dakota State Highway Commissioner,

Defendant-Appellant.

Case No. 870035

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Grand Forks-Traill Water Users, Inc., the appellee above, hereby appeals to the Supreme Court of the United States from the final judgment of the North Dakota Supreme Court dated September 29, 1987. This appeal is taken pursuant to 28 U.S.C.§1257(2).

Dated this 25th day of November, 1987.

John D. Kelly
VOGEL, BRANTNER, KELLY, KNUTSON, WEIR & BYE, LTD.
502 First Avenue North
P.O. Box 1389
Fargo, North Dakota 58107
(701) 237-6983
Attorneys for Appellee Grand Forks-Traill Water Users, Inc.

Grand Forks-Traill Water Users, Inc. v. Hjelle

STATE OF NORTH DAKOTA
COUNTY OF CASS
ss.

AFFIDAVIT OF SERVICE
BY MAIL

Susan R. Olerud, being first duly sworn on oath, does depose and say: She is a resident of the City of Fargo, of legal age, and not a party to the above entitled matter.

On the 25th day of November, 1987, affiant deposited in the United States Post Office of Fargo, North Dakota, a true and correct copy of the following documents:

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

The copies of the foregoing were securely enclosed in an envelope with postage prepaid and addressed as follows:

Mr. Mike Bothun
Mr. Steven F. Lamb
Assistant Attorneys General
State Highway Department
600 East Boulevard Avenue
Bismarck, ND 58501

To the best of affiant's knowledge, the address above given was the actual post office address of the party intended to be served. The above documents were duly mailed in accordance with the provisions of the Rules of Civil Procedure.

Susan R. Olerud

Subscribed and sworn to before me this 25th day of November, 1987.
Notary Public

HELEN N. HELM
Notary Public, State of North Dakota
My Commission Expires Feb. 1, 1991
STATE OF NORTH DAKOTA
NOTARY PUBLIC SEAL

APPENDIX C

IN DISTRICT COURT, COUNTY OF TRAILL, STATE OF NORTH DAKOTA

Grand Forks-Traill
Water Users, Inc.,

Plaintiff,

vs.

Walter R. Hjelle, North
Dakota State Highway
Commissioner,

Defendant.

MEMORANDUM OPINION
Civil No. 8611

This case is before the Court to determine the constitutionality of North Dakota Century Code Sections 24-01-42 and 24-01-43. The parties have stipulated as to the facts (attached hereto and made a part of this Opinion) which, along with the exhibits, constitute the record before the Court. The Court being fully advised in the premises now makes its determination.

Plaintiff frames the issue in this case as "whether the legislature can burden the land of property abutting state highways indefinitely with restrictions designed to limit the costs to the state of possible future right-of-way acquisition." Brief at 5. The Defendant maintains that the challenged legislation embodies "an appropriate exercise of a le-

gitimate police power, and is constitutional." Brief at 9. The Court is persuaded that Plaintiff holds the better reasoned opinion.

The statutes at issue are as follows:

> 24-01-42. "Construction of utility facility-Limitation.-No person, firm or association shall construct any electrical supply or communication line, gas, oil or water or other pipeline parallel to and within one hundred feet (30.48 meters) of the center line of any state highway right of way or within seventy-five feet (22.86 meters) of the center line of any county highway right of way without first obtaining the consent of the highway commissioner or board of county commissioners except that such prohibition shall not apply to highways or streets located within areas platted as townsites or additions and subdivisions thereof."
>
> 24-01-43. Utility facility-Removal.-"Any utility or transmission line hereinafter constructed contrary to the provisions of section 24-01-42 shall be removed at the expense of the utility, when such removal is required for purposes of highway expansion."

It is proper that our inquiry proceed pursuant to our state constitution - see *State v. Jewett,* 500 A.2d 233 (Vt. 1985) - as well as under analagous Federal constitutional provisions. The subject statutes are unconstitutional in that they authorize a taking or damaging of private property for public use without compensation and, alternatively, violate concepts of equal protection.

Plaintiff's basic argument is that the "legislature has improperly attempted to use the police power

instead of eminent domain to restrict land for future highway expansion." Reply Brief at 3. Plaintiff also counters Defendant's argument that the statutes at issue constitute valid zoning regulations.

TAKING OR DAMAGING OF PROPERTY WITHOUT COMPENSATION

That there was a "taking" in this case seems obvious. "The Highway Department proceeded with its highway improvement plans in 1985. Because the Highway Department excavated several feet of the ground cover over the water line, Grand Forks-Traill was required to relocate its water line in order to avoid frost damage." Stipulation at 4. But is this "taking" unconstitutional? The Plaintiff maintins that the "self-evident purpose of these statutes is to restrict development so as to keep down the cost of future highway expansion." Brief at 7. The Court does not agree that Plaintiff's hypothesis is necessarily self-evident, but is rather a reasonable deduction.

"It is within the especial province and duty of the courts and the courts alone, to say what the law is, and to determine whether a statute...is constitutional, and no express constitutional authority for such action is necessary; it is a necessary consequence of our system of government." 16 *Am.Jr.2d,* Constitutional Law Section 150 at 521-523 (1979). A party alleging the unconstitutionality normally must carry the burden of substantiating his claim. *Id.* Section 251 at 708. In North Dakota, "any person who claims that some right, guaranteed to him by the Constitution, is contravened by a statute, must be able to point to the specific constitutional provision or provisions that are contravened." *State v. Ligaarden,* 230 N.W. 729, 730 (ND 1930). Plaintiff has done so. See Brief. "He

must show how, as to him, the legislation in question is unconstitutional." *16 Am.Jur.2d,* Constitutional Law Section 251 at 711. It is said that "a legislative classification must be sustained if any reasonable distinction in support thereof can be found." *Id.* Section 252 at 713. Presumptions in favor of the constitutionality of statutes are conclusive, "unless it is *clearly shown* that the enactment is prohibited by the Constitution of the State or of the United States." *State v. Board of University and School Lands,* 262 N.W. 60, 64 (ND 1935) (emphasis added). The similar opinion has been expressed "that the conviction required to overcome the presumption in favor of a statute must be clear and strong" and "that a law should never be lightly overthrown or set aside as unconstitutional." *16 Am.Jur.2d,* Constitutional Law Section 253 at 716, *citing Wilson v. Fargo,* 186 N.W. 263 (ND 1921).

Therefore, in order to meet its allegation that there is an impermissible purpose behind the statutes being challenged in this case, the Plaintiff must clearly show or clearly and strongly show that the legislation is unconstitutional. Plaintiff has done so via legal reasoning. *Galt v. Cook County,* 91 N.E.2d 395 (Ill. 1950) is of particular interest. *Galt* states the apparent Illinois rule that "(m)unicipalities and counties may adopt zoning ordinances in a proper exercise of the police power and may thereby impose a reasonable restraint upon the use of private property." *Id.* at 399. The Defendant in our present case likewise relies on the police power-zoning argument. "To be valid, a zoning ordinance must have a real and substantial relation to the public health, safety, morals or general welfare." *Id.*

"Statutory enactments and municipal ordinances having for their purpose the protection of the public health, safety, morals and public welfare are

founded upon the police power inherent in the state." *Soderfelt v. City of Drayton*, 59 N.W.2d 502, 507 (ND 1953). North Dakota courts will not declare legislation unconstitutional "unless the statute or ordinances are clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals or public welfare." *Id. Galt* and *Soderfelt* recognize the same test of unconstitutionality.

The *Galt* court, in considering a claim for injunctive relief from a county zoning ordinance, found "no real or substantial relation between the zoning of plaintiffs' land and the public health, safety, comfort, morals or general welfare, and the gain, if any there be, to the public resulting from the ordinance is exceedingly small compared to the hardship imposed upon plaintiffs." *Galt*, 91 N.E.2d at 400. However, it is important to note that the *Galt* court apparently had some hard evidence on which to base its decision: "Furthermore, the record makes it abundantly clear that the primary purpose of the...restriction was to hold down the cost of acquiring additional land...at the expense of a few individual landowners." Id.

Although the Plaintiff alleges that it is "self-evident" that the statutes are unconstitutional, it points us to no solid supportive evidence. On the other hand, Plaintiff's legal arguments successfully refute allegations that Sections 24-01-42 and 24-01-43 promote "public health, safety, morals and public welfare" justifying the use of the State's police power. See Brief at 7-15. For example, the Court of Appeals of New York (that State's highest court) once stated:

> The validity of a law is to be determined by its purpose, and its reasonable and practical effect and operation, though enacted un-

> der the guise of some general power, which the legislature may lawfully exercise, but which may be, and frequently is, used in such manner as to encroach, by design or otherwise, upon the positive restraints of the constitution.

Forster v. Scott, 32 N.E. 976, 977 (N.Y.App. 1893). The New York court apparently considered and gave weight to the challenged legislation's "reasonable and practical effect and operation." Another pertinent case is *Arkansas Louisiana Gas Company v. Louisiana Department of Highways*, 104 So.2d 204 (La.App. 1958). The *Arkansas Louisiana* case notes that, in relation to the police power, "the extent of this power and the drastic effects of its application clearly indicate the restriction of its employment to matters of grave and immediate public concern." *Id.* at 207. Furthermore,

> Implicit in every judicial comment upon the police power is the principle that its use and exercise must be carefully and zealously guarded in the interest of preserving the rights and liberties of individuals who may not be subjected to the burdens of its improper use under the guise of the protection of the people as a whole. We would accord more merit and greater consideration to defendant's contention on this point if it appeared that its regulatory requirements in the instant case could have been effected only by and through the exercise of the police power.

Id. at 207-208. This court added "(t)hat this is not a justified conclusion is obvious from the facts." *Id.* at 208. This same can be said of this case. The Highway Department, in seeking to acquire new right-of-way, can certainly proceed by

condemnation pursuant to the rules of eminent domain - exercise of police power is not the "only" remedy and maintaining potential right-of-way in a condition free of improvements does not seem to be a matter of "grave and immediate public concern."

None of these aforementioned cases involved legislation such as we are presently involved with, i.e., legislation purporting to restrict development as in our 100 foot wide strip. However, in *Maryland National Capital Park and Planning Commission v. Chadwick,* 405 A.2d 241 (Md.App. 1979), the plaintiffs there requested "a declaratory judgment that the reservation of their property and any statute requiring such reservation were unconstitutional as a taking of property without payment of just compensation." Id. at 243-244. A statute implicated in *Chadwick* allowed for property to be put into a reservation status, with development strictly restricted, whether or not the land was ultimately acquired for future expansion. Id. at 243. The reservation of land in *Chadwick* and the 100 foot strip here are analagous for purposes of constitutional analysis. *Chadwick* notes that "(t)he power of the state over private property extends from the regulation of its use and enjoyment under the police power, to its actual appropriation under the eminent domain power upon payment of just compensation." *Id.* at 244. "We have consistently upheld regulations which may have, as an incidental effect, the dimunition of value of property, so long as those regulations have been shown to be fair exercises of the police power." *Id.* at 245. The Court thought that "the Commission's resolution placing appellee's land in reservation for a period up to three years stripped the landowners, for that period of time, of all reasonable use of their property and was tantamount to a 'taking' without compensation as the

lower court declared." *Id.* at 247. To be sure, the *Chadwick* court placed a great deal of emphasis on "the flat prohibition contained in the ordinance against grading the land, erecting any structures thereon, or removing trees, top soil or other cover." *Id.* at 247. Sale of land "as may be necessary for water, sewer or road right of way for public agencies" is also prohibited by the Maryland statute unless approved by the board. *Id.* at 243. The statute also specifically stated "nor shall any land so reserved be put to any use whatsoever, except upon written approval of the board." *Id.* Compare Section 24-01-42.

The *Chadwick* court's holding was a narrow one, concluding "only that the Commission's resolution passed pursuant to Section 50-31 of the County Code, placing appellee's land in reservation for up to three years, without any reasonable uses permitted as of right, was tantamount to a "taking" in the constitutional sense." *Id.* at 250. It is submitted that (1) it is reasonable for a landowner to lease some land to a rural water supplier for purposes of an easement and (2) it is reasonable to construct a water supply pipeline on that easement. This would appear to be especially true in the situation where a necessity such as water must be provided.

The Court therefore concludes that Sections 24-01-42 and 24-01-43 are unconstitutional in that they purport to effect a constitutional "taking" without just compensation.

EQUAL PROTECTION

The contention is also made that the statutes at issue violate constitutional guarantees of equal protection.

> "Classifications are not *per se* prohibited or prevented, provided such classification is rea-

> sonable for the purpose of legislation, is based on proper and justifiable distinctions considering the purpose of the law, is not clearly arbitrary, and is not a subterfuge to shield one class or to burden another or to oppress unlawfully in its administration."

State v. Kainz, 321 N.W.2d 478, 481 (ND 1982), *citing State v. Hanson,* 256 N.W.2d 364 (ND 1977), *quoting In Re Estate of Jensen,* 162 N.W.2d 861, 863 (ND 1968).

"Equal protection requires rational relationship between classification and purpose of statute; if classifications are arbitrary, unreasonable, or unwarranted, then they offend constitutional standards." *Kainz, supra,* at 478. "A facially neutral statute may violate equal protection in its application or effect." *State v. Mathisen,* 356 N.W.2d 129, 133, (ND 1984).

Plaintiff maintains that "the classification established by Section 24-01-42 and Section 24-01-43 is arbitrary because it restricts the placement of electrical and telephone lines and gas, oil or water pipelines parallel to and within 100 feet of state highways, but it places no similar restrictions on the construction of fences, buildings, television towers, industrial facilities, or even a private road." Brief at 21.

The Court does not accept the argument that since "these statutes treat all utilities alike,...there is no classification." Defendant's Brief at 18. While on the one hand it may be argued persuasively that electrical supply or communication lines or gas, water, oil or other pipelines are most likely to be found alongside roadways, and therefore it is only reasonable to attempt to regulate them, it is nonetheless also true that nothing else is expressly excluded by Section 24-01-42. The statute attempts to restrict some of the more likely uses of roadside

land in North Dakota. The hazard concerns raised in Defendant's brief as justification are unreasonable. *Id.* It appears obvious that the Legislature, in enacting Section 24-01-42, has created a classification of "permissible" and "impermissible" uses. In the words of *In Re Estate of Jensen,* quoted earlier, this legislation appears to burden one class of potential land-users and to "oppress unlawfully in its administration." *See Jensen, supra,* at 863.

Defendant has primarily relied upon the inherent police power of the State in support of its position. It has also argued that Section 24-01-42 is a valid zoning regulation. In the latter connection, it need only be noted that a zoning regulation "must operate uniformly on those similarly situated." *Northwestern College v. City of Arden Hills,* 281 N.W.2d 865, 869 (Minn. 1979) (a private college sought a declaratory judgment that the decision of the city denying its application for a special use permit to build fine arts center was arbitrary, capricious, and void). The court noted that

> the equal protection clauses of the Minnesota Constitution and of the Fourteenth Amendment of the United States Constitution require that "one applicant not be preferred over another for reasons unexpressed or unrelated to the health, welfare or safety of the community or any other particular and permissible standards or conditions imposed by the relevant zoning ordinances."

Id. at 869. It seems impermissible that, by the terms of the statute, a distinction is drawn between a person who wants to put in a pipeline and some other person who may want to construct, for example, a billboard. Why does the former need permission while the latter does not? Billboards may be regulated elsewhere, but they are not regulated by

Section 24-01-42. Therefore, similarly situated people - land owners or land lessees - are disparately treated. There is no rational relationship between the distinction and the purpose of the statute. The classification is unreasonable and unwarranted, and offends the Constitution.

SUMMARY

The Defendant's goals can be achieved without resort to the police power. There does not appear to be a justified, let alone fair, exercise of police power being attempted in the present case. Requiring some people to obtain permits while excluding others is in this situation unreasonable and is, therefore, an impermissible classification.

The statues are unconstitutional, and Plaintiff is directed to prepare Findings and Conclusions of Law pursuant to this Opinion.

Dated this 19th day of June, 1986.

BY THE COURT:
Norman J. Backes
Presiding Judge
East Central Judicial District

APPENDIX D

IN DISTRICT COURT, COUNTY OF TRAILL, STATE OF NORTH DAKOTA

Grand Forks-Traill
Water Users, Inc.

Plaintiff,

vs.

Walter R. Hjelle, North
Dakota State Highway
Commissioner,

Defendant.

MEMORANDUM OPINION

Civil No. 8611

On June 19, 1986, this Court issued its Memorandum Opinion in the above-entitled matter holding that Sections 24-01-42 and 24-01-43 of the North Dakota Century Code were unconstitutional. There remains one issue yet to be decided before the Judgment may be entered in this matter, that of attorney fees and costs of litigation.

The parties have stipulated that the Plaintiff has incurred throughout the proceedings herein attorney fees in the total amount of $14,000.00, and costs in the total amount of $500.00, which costs and attorney fees are fair and reasonable charges in connection with this litigation. The Defendant moves the Court to deny the Plaintiff's attorney fees and costs in the Court's discretion or alternatively, on the grounds that the action is not one in inverse condemnation, but rather one in the proper exercise of the State's police power.

The question before this Court is whether the provisions of Century Code 32-15-32 would apply

and allow the Court to grant reasonable attorney fees in the Court's discretion.

The Defendant does not consider this an inverse condemnation action. The Plaintiff in this matter asked the Court to determine the constitutionality of North Dakota Century Code Sections 24-01-42 and 24-01-43. The action of the Plaintiff necessarily proceeds from the alleged violation of the Plaintiff's rights under Article 1, Section 16 of the Constitution of North Dakota, which provides that property shall not be taken or damaged for public use without just compensation. The action of Plaintiff thus having proceeded from a constitutional right through which the Plaintiff has received compensation for the taking or damaging of his property for public use, it follows that at the Court's discretion reasonable costs and attorney fees are allowable.

The Defendant in the above-entitled action has failed to satisfy the Court that it would be improper to assess attorney fees and costs for the services rendered against the Defendant relative to this claim. Therefore, attorney fees and costs are allowed in the stipulated amounts.

Dated this 19th day of November, 1986.

BY THE COURT:
Norman J. Backes
Presiding Judge
East Central Judicial District

APPENDIX E

IN DISTRICT COURT, TRAILL COUNTY, STATE OF NORTH DAKOTA

Grand Forks-Traill Water Users, Inc.,

Plaintiff,

vs.

Walter R. Hjelle, North Dakota State Highway Commissioner,

Defendant.

Civil No. 8611

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above entitled action came on for hearing before Norman J. Backes, District Judge, at Fargo, North Dakota, on May 2, 1986. The plaintiff was represented by its attorneys John D. Kelly and Harlan G. Fuglesten of the law firm of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd., of Fargo, North Dakota. The defendant was represented by his attorney, Steven F. Lamb, Assistant Attorney General, North Dakota State Highway Department, Bismarck, North Dakota. The court received evidence in the form of a Stipulation of the parties dated February 20, 1986. Based upon this Stipulation, together with the briefs and arguments of counsel, the Court issued a Memorandum Opinion on June 19, 1986, in which it found for the plaintiff on the issue of liability. Subsequently, the parties entered into an additional Stipulation dated October 23, 1986, in which they agreed to the

amount of damages and attorney's fees and costs and the defendant made a motion objecting to the award of plaintiff's attorney's fees and costs. The Court entered its Memorandum Opinion on November 19, 1986, indicating that the plaintiff is entitled to an award of attorney's fees and costs.

The Court having now considered Stipulations regarding all of the factual issues in the case, and having considered the arguments and briefs of counsel relating to the legal issues presented, hereby makes the following Findings of Fact, Conclusions of Law, and Order for Judgment.

FINDINGS OF FACT

1. Grand Forks-Traill is a North Dakota non-profit corporation engaged in supplying water to residents of rural Grand Forks and Traill counties.

2. Hjelle is the Highway Commissioner for the State of North Dakota.

3. The dispute in this case relates to the right-of-way adjacent to North Dakota State Highway 18 running north and south of Hatton, North Dakota.

4. In 1971 and 1972 Grand Forks-Traill obtained easements from private land owners in Traill and Grand Forks counties for the construction of a water line. Such easements include the right-of-way over private land abutting State Highway 18, including easements in Sections 20, 29 and 32 on the west side (west of State Highway 18), in Township 149, Range 53, Grand Forks County, North Dakota; easements in Sections 6 and 7 (west of State Highway 18), Sections 5, 8, 17, 20, 29 and 32 (east of Highway 18), all in Township 148, Range 53, Traill County, North Dakota; and Section 5 (east of State Highway 18), in Township 147, Range 53, Traill County, North Dakota. Each of these easements was 30 feet in width and the center line of

which was a minimum distance of 15 feet west or east of the highway right-of-way of State Highway 18. All such easements as herein described and herein pertinent are of record in the Grand Forks or Traill counties' Register of Deeds office.

5. Pursuant to these easements, Grand Forks-Traill proceeded to construct a section of water line approximately 13 miles in length, which was installed outside of the Highway Department's then-existing right-of-way, within the easements obtained by Grand Forks-Traill. However, the water line was located within 100 feet of the center line of State Highway 18.

6. In 1984, the Highway Department acquired additional right-of-way and construction easements for planned highway improvements along State Highway 18. The additional right-of-way and construction easements obtained by the Highway Department included land upon which Grand Forks-Traill had its water line easements.

7. In August 1984, the Highway Department notified Grand Forks-Traill that it planned highway improvements in the area of Grand Forks-Traill's water line, with construction to commence in 1985. The Highway Department further claimed the water line was within the Highway Department's newly acquired right-of-way and that any costs incurred by Grand Forks-Traill as a result of the highway construction would be uncompensated.

8. Grand Forks-Traill responded to the Highway Department's notification by advising the Department that it was willing to remove any sections of water line in the original highway right-of-way at its own expense, but indicated that the Highway Department must pay for relocation of the sections of water lines which were constructed outside of the Department's original right-of-way.

9. The Highway Department has not provided any compensation to Grand Forks-Traill for interfering with its easement rights and for the costs of relocating the water line. Instead, the Department relied on *North Dakota Century Code* §24-01-42 and § 24-01-43 to deny the validity of Grand Forks-Traill's easements and to avoid paying just compensation.

10. In 1959, the legislature passed House Bill No. 811 which was subsequently codified as *North Dakota Century Code* §§24-01-42 and 24-01-43. As amended in 1963, these statutes read as follows:

> 24-01-42. Construction of utility facility--Limitation--No person, firm or association shall construct any electrical supply or communication line, gas, oil or water or other pipeline parallel to and within one hundred feet (30.48 meters) of the center line of any state highway right of way or within seventy-five feet (22.86 meters) of the center line of any county highway right of way without first obtaining the consent of the highway commissioner or board of county commissioners except that such prohibition shall not apply to highways or streets located within areas platted as townsites or additions and subdivisions thereof.
>
> 24-01-43. Utility facility--Removal.--Any utility or transmission line hereinafter constructed contrary to the provisions of section 24-01-42 shall be removed at the expense of the utility, when such removal is required for purposes of highway expansion.

11. Hjelle did not consent to the installation of Grand Forks-Traill's water line outside of Highway Department right-of-way but within 100 feet of the center line of State Highway 18. The Highway De-

partment did issue permits allowing Grand Forks-Traill to cross under Highway 18 with its water line in several locations. Grand Forks-Traill acknowledged that it was responsible for paying all costs associated with its relocation of water line crossing State Highway 18 through the highway right-of-way.

12. The Highway Department proceeded with its highway improvement plans in 1985. Because the Highway Department excavated several feet of the ground cover over the water line, Grand Forks-Traill was required to relocate its water line in order to avoid frost damage.

13. The Highway Department denied liability to Grand Forks-Traill for the cost of relocating its water line.

14. The plaintiff incurred fair and reasonable costs and expenses in the total principal amount of $42,347.91 to relocate its water line along North Dakota State Highway 18 as a result of the Highway Department excavation of several feet of the ground cover over plaintiff's existing water line.

15. The plaintiff's relocation of its water line along North Dakota State Highway 18 was completed on October 30, 1985.

16. The plaintiff has or will incur through all proceedings herein in the District Court, attorneys fees in the total amount of $14,000 and costs in the total amount of $500, which are fair and reasonable charges and costs for the legal work performed on behalf of the plaintiff in connection with this litigation through all proceedings in the District Court.

CONCLUSIONS OF LAW

1. NDCC §24-01-42 and § 24-01-43 violate the North Dakota and United States Constitutions in authorizing a taking or damaging of private proper-

ty for public use without just compensation.

2. NDCC § 24-01-42 and § 24-01-43 violate the North Dakota and United States Constitutions by establishing an unreasonable and arbitrary classification of permissible land uses which bears no rational relationship between the classification and any proper purpose of the statutes.

3. NDCC § 24-01-42 and § 24-01-43 do not constitute valid zoning statutes.

4. The plaintiff's property has been taken or damaged for a public use without compensation.

5. This is a proper action in which the Court may award the plaintiff its reasonable attorney's fees and costs incured herein.

6. The plaintiff is entitled to compensation for the fair and reasonable costs and expenses for the defendant's interference with its easements rights in the principal amount of $42,347.91, together with interest at the legal rate from and after October 30, 1985. In addition, the plaintiff is entitled to its attorney's fees incurred herein of $14,000, and its costs in this action of $500.

ORDER FOR JUDGMENT

Let Judgment be entered in accordance with the attached form of judgment which is hereby specifically approved by the Court.

Dated this 3rd day of December, 1986.

By the Court:
Norman J. Backes
District Judge
East Central Judicial District

APPENDIX F

IN DISTRICT COURT, TRAILL COUNTY, STATE OF NORTH DAKOTA

Grand Forks-Traill Water Users, Inc.,

Plaintiff

vs.

Walter R. Hjelle, North Dakota State Highway Commissioner,

Defendant.

Civil No. 8611

JUDGMENT

The above entitled action came on for hearing before the Honorable Norman J. Backes, District Judge for the Southeast Judicial District, at Fargo, North Dakota, on May 2, 1986. The plaintiff was represented by its attorneys John D. Kelly and Harlan G. Fuglesten of the law firm of Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd., of Fargo, North Dakota. The defendant was represented by his attorney, Steven F. Lamb, Assistant Attorney General, North Dakota State Highway Department, Bismarck, North Dakota. The Court being advised in the premises and having made its Findings of Fact, Conclusions of Law and Order for Judgment in favor for the plaintiff.

It is now, in accordance with said Order for Judgment, ORDERED, ADJUDGED, and DECREED as follows:

1. The plaintiff shall have and recover from the defendant as compensation the principal sum of

$42,347.91, together with interest at the legal rate from and after October 30, 1985, in the amount of $2,707.44 through December 3, 1986. In addition, the plaintiff shall have and recover its attorney's fees of $14,000.00, and its stipulated costs in this action in the sum of $500.00.

WITNESS, the Honorable Norman J. Backes, Judge of the District Court, and my hand and seal this 4th day of December, 1986.

Clerk of District Court

State of North Dakota
County of Traill
ss

I hereby certify that the within judgment was entered on the 4th day of December A.D. 1986 at 11:00 o'clock A.M. In Book — of Judgments on page — and was duly docketed in Docket F Page 1268.

Howard Carver
Clerk of Court
By _____ Deputy

APPENDIX G

24-01-42. Construction of utility facility—Limitation—No person, firm or association shall construct any electrical supply or communication line, gas, oil or water or other pipeline parallel to and within one hundred feet (30.48 meters) of the center line of any state highway right of way or within seventy-five feet (22.86 meters) of the center line of any county highway right of way without first obtaining the consent of the highway commissioner or board of county commissioners except that such prohibition shall not apply to highways or streets located within areas platted as townsites or additions and subdivisions thereof.

Source: S.L. 1959, ch. 222,§1; 1963, ch. 213§1.

24-01-43. Utility facility—Removal.—Any utility or transmission line hereinafter constructed contrary to the provisions of section 24-01-42 shall be removed at the expense of the utility, when such removal is required for purposes of highway expansion.

Source: S.L. 1959, ch. 222,§2.

Supreme Court, U.S.
FILED
FEB 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1081

In The

Supreme Court of the United States

October Term, 1987

GRAND FORKS-TRAILL WATER USERS, INC.,

v. *Appellant,*

WALTER R. HJELLE
NORTH DAKOTA STATE HIGHWAY COMMISSIONER,

Appellee.

On Appeal from the Supreme Court of the State of North Dakota

MOTION TO DISMISS OR AFFIRM

STEVEN F. LAMB
TERRY L. ADKINS, Counsel of Record
Assistant Attorneys General
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210
Attorneys for Appellee

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 pp

TABLE OF CONTENTS

Pages

Table of Contents i

Table of Cases ii

Table of Statutes and Other Authorities iii

Motion to Dismiss or Affirm 1

I. The Statue Involved and the Nature of the Case 1

A. The Statute 1

B. The Proceedings Below 3

II. Argument and Law 4

A. Appellant Lacks Standing 4

B. No Substantial Federal Question 6

1. Appellant contends that this Court has previously considered a similar case 6

2. Appellant contends that the Setback effected a taking because it resulted in an actual physical invasion and occupation of an easement 7

3. Appellant contends that the Setback is not supported by, nor does it substantially advance, legitimate state interests 8

4. Appellant contends that the Setback impermissibly imposes a detriment to a private property interest because it serves an enterprise rather an arbitration function of state government 14

III. Conclusion 16

TABLE OF AUTHORITIES

Pages

TABLE OF CASES

Arkansas La. Gas Co. v. La. Dept. of Highways, 104 So.2d 204 (La. App. 1958) 7

Grand Forks-Traill Water Users v. Hjelle, 413 N.W.2d 344 (ND 1987) 6, 13

Headley v. Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936) 10, 11

Hicks v. Miranda, 422 U.S. 332 (1975) 8

Magnolia Pipe Line Company v. City of Tyler, 348 S.W.2d 537 (Tex. Civ. App. 1961) 7

Maryland-Nat. Capital Park v. Chadwick, 405 A.2d 241 (Md. App. 1979) 13

Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (ND 1978), *appeal dismissed* 460 U.S. 901 (1979) 8

Nollan v. California Coastal Commission, 483 U.S. ___, 107 S.Ct. 3141 (1987) 13, 14

Panhandle Eastern Pipe Line Co. v. State Highway Commissioner, 294 U.S. 613 (1935) 6

State v. Manders, 2 Wis.2d 365, 86 N.W.2d 469 (1957) 10, 11, 12

Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) 13

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 4

TABLE OF AUTHORITIES–(Continued)

Pages

TABLE OF STATUTES AND OTHER AUTHORITIES

N.D.C.C. §24-01-01 ..... 9, 11, 12

N.D.C.C. §24-01-42 2

N.D.C.C. §24-01-43 2

16 Am.Jur.2d Constitutional Law, §206 5

16 Am.Jur.2d Constitutional Law, §365 14

39 Am.Jur.2d Highways, Streets, and Bridges §278 (1968) (fn. 6) 7

Freilich and Rasdal, *Timing and Sequential Controls–The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region,* 58 Minn. L. Rev. 1009 10

No. 87-1081

In The

Supreme Court of the United States

October Term, 1987

GRAND FORKS-TRAILL WATER USERS, INC.,

v. *Appellant,*

WALTER R. HJELLE
NORTH DAKOTA STATE HIGHWAY COMMISSIONER,

Appellee.

On Appeal from the Supreme Court of the State of North Dakota

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of North Dakota on the ground that the questions on which the decision of the case depends have been decided by the Supreme Court of the State of North Dakota in accordance with the provisions of the United States Constitution and are so unsubstantial as to require no further argument or review by this Court.

I.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTE

This appeal concerns the question of whether two North Dakota statutes (North Dakota Century Code Sections 24-01-42 and 24-01-43 enacted in 1959 and amended in 1963–hereafter referred to as the "Setback") are reasonable land use regulations under the states police power by promoting the public's general welfare and safety.

The Setback provides that unless consent is initially obtained from the highway commissioner or board of county commissioners, no person shall construct any electrical supply or communication line, gas, oil or water or other pipeline parallel to and within one-hundred feet of the center line of any state highway right of way or within seventy-five feet of the center line of any county highway right of way. Consent is not required for constructing parallel to highways and streets located in platted townsites, additions, and subdivisions thereof. However, if consent is not obtained, the utility line shall be removed at the utilities expense when removal is required for purposes of highway expansion. The highway commissioner can grant consent after a permit form is filed with the commissioner by the utility. The form provides information on such safety matters as the size of pipeline casing, pipeline pressure, location of appurtenances (vents, manholes, valves, etc.), size of facility, and number of cables, in addition to providing information on the applicants identity and the utilities proposed location.

B. THE PROCEEDINGS BELOW

In 1959, the use of utilities on all unplatted rural, property parallel and within 102 feet of the center line of existing state highway right of way (hereafter Setback Zone) was regulated. In 1963, the Setback Zone was reduced to 100 feet. In 1971 and 1972 several farmers granted Grand Forks-Traill Water Users, Inc. (hereafter GF-TW) utility easements on strips of farm land parallel to and within the regulated Setback Zone of an existing state highway (state Highway 18), but outside the state highway owned right of way. GF-TW constructed its utility line within its easement, but within the Setback Zone and without a permit–even though it acquired permits to construct its utility within state highway owned right of way.

In 1984, the highway department acquired various type easements (extending over those granted to GF-TW) for planned highway construction on Highway 18. The highway department notified GF-TW of the planned highway improvements, and denied GF-TW compensation for any necessary relocation costs created by the construction. In 1985, the planned highway construction proceeded during which grade work removed several feet of earth over GF-TW's buried pipeline. To avoid potential freezing GF-TW relocated its pipeline, but the highway department refused to compensate GF-TW for the relocation costs because no permit was acquired.

In August 1985, GF-TW commenced a declaratory action against the highway commissioner, and requested that the Setback be declared unconstitutional as a taking without compensation, as an equal

protection violation, and as an unlawful delegation of power, and requested damages, attorney fees and costs. The facts were stipulated and the trial court entered its judgment finding the Setback unconstitutional as a taking and in violation of equal protection under both United States' and North Dakotas' Constitutions, and granted GF-TW damages, attorney fees and costs. The highway commissioner appealed to the North Dakota Supreme Court which reversed the trial court, and upheld the constitutionality of the Setback as a proper police power land use utility regulation.

II

ARGUMENT AND LAW

A. APPELLANT LACKS STANDING

GF-TW requests this Court's jurisdiction, but first it must be determined whether GF-TW has standing to request this Court's jurisdiction. Standing requires an injury in fact and cannot be based on the legal interest of others. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982).

The Setback only regulates the use of utility lines on unplatted rural land, basically unimproved farm and ranch land; it does not regulate or affect any other use of the land. The Setback restricts a particular future use of the land similar to a covenant running with the land, but with an escape valve–the permit. In 1959, use of the land was statutorily restricted by the

Setback which required permission prior to utility line construction within the Setback Zone. In 1971 and 1972 GF-TW took its easements subject to the existing Setback restriction on the land.

In other words, if any taking occurred because of the land use restriction (an unsupportable conclusion in itself), the taking was from the landowners who granted GF-TW its utility easements. GF-TW cannot acquire rights in land that the landowner did not have to convey. Consequently, GF-TW acquired a restricted utility easement. The restriction required GF-TW to obtain the highway commissioner's consent before constructing a utility line or no compensation would be made if relocation was required by highway expansion.

GF-TW accepted the easements for what they were. It knew or should have known that the easements were restricted by law. In the face of the restriction requiring a permit to construct a utility line within the Setback Zone, GF-TW did construct within the zone without permission. By doing so, it implicitly, if not explicitly, accepted the condition of not being reimbursed for relocation if highway expansion occurred. As the concurring opinion in the North Dakota Supreme Court decision on this case stated:

> "Not only should a party who requests permission and is denied be entitled to challenge the constitutionality of the law at that time, such action should be a requisite to a challenge. The general rule is that a constitutional question must be raised at the earliest opportunity or it will be deemed waived. 16 Am.Jur.2d Constitutional Law, 206. The proper time to raise the issue was at the time the lines were installed contrary to the statute."

Grand Forks-Traill Water Users v. Hjelle, 413 N.W.2d 344, 350 (ND 1987).

Therefore, GF-TW was not injured in fact by the Setback because it acquired easements already restricted by the Setback; i.e., the injury (if any) occurred to a previous landowner. Even if GF-TW had standing to represent the third party previous landowner's interests, GF-TW waived its standing by not challenging the Setback when it constructed its utility line without obtaining consent: GF-TW by its actions agreed to the Setback's conditions.

B. NO SUBSTANTIAL FEDERAL QUESTION

This case presents no substantial federal question.

1. *Appellant contends that this Court has previously considered a similar case.* Appellant relies on *Panhandle Eastern Pipe Line Co. v. State Highway Commissioner,* 294 U.S. 613 (1935). The *Panhandle* case concerned a Kansas statue that (as interpreted by the Kansas Supreme Court) gave the state highway commissioner the power to force a preexisting gas pipeline company to move its pipeline without compensation from after acquired highway right of way. *Id.* at 615-616. Actually, the facts and argument put forth by the gas pipeline company in *Panhandle* supports the highway commissioner in this case. The pipeline company contended that, "because its rights of way were acquired and its structures were installed before the present highway rights of way had been obtained . . ., it is entitled to compensation. . . ." *Id.* at 617. The pipeline company was correct. If the utility line is in

existence *prior* to the existence of the highway right of way, the utility line owners must be compensated if highway expansion requires relocation; on the other hand, if the utility line was installed *after* the highway right of way was established, the utility must relocate at its own cost. *Arkansas La. Gas Co. v. La. Dept. of Highways,* 104 So.2d 204, 208-209 (La. App. 1958); *Magnolia Pipe Line Company v. City of Tyler,* 348 S.W.2d 537 (Tex. Civ. App. 1961) ; 39 Am.Jur.2d Highways, Streets, and Bridges §278 (1968) (fn. 6). The principal is: First in time, first in right. In this case, the highway commissioner was first in time. The Setback, even after amended in 1963, applied to the land where GF-TW placed its pipeline long (ten years) before GF-TW obtained its easements. Thus, just as the utility line owner must relocate at its own cost when it establishes its utility line later in time to the highway department's establishment of its right of way, Traill Water must relocate at its own cost because it acquired its easements later in time to the enactment of the Setback.

2. *Appellant contends that the Setback effected a taking because it resulted in an actual physical invasion and occupation of an easement.* The 1959 Setback has not resulted in a permanent physical occupation. Its object is nonoccupation. The land within the Setback Zone but outside the highway right of way can bring fair returns to the landowner through other uses; e.g., farming and ranching. Any occupation by the Setback is intangible and does not affect any use other than constructing utility lines. Any occupation by the Setback attached to the land in 1959; thus, GF-TW accepted its easements subject to the Setback's prior

occupation. The Setback may and has, as this case attests, resulted in a temporary physical invasion causing relocation costs to a utility line company. But again, it must be emphasized that GF-TW was granted its easements subject to the prior enacted Setback which allowed for a temporary physical invasion during highway expansion.

3. *Appellant contends that the Setback is not supported by, nor does it substantially advance, legitimate state interests.* The test for determining the constitutional validity of a land use regulation was stated in *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741, 755-756 (ND 1978), *appeal dismissed* 440 U.S. 901 (1979):

> "It has generally been held that a reasonable restriction on the use of property pursuant to a state's police power does not constitute a taking of private property for public use requiring payment of just compensation so long as the regulation is reasonably related to a proper purpose and does not unreasonably deprive the property owner of all or substantially all beneficial use of his property. [Citations omitted.]"

In *Newman,* this Court affirmed[1] the North Dakota Supreme Court's holding that the state's regulation of billboards was reasonably related to a proper purpose, and, since only one particular future use of the appellant's property was regulated while leaving available all other uses, the regulation did not have the effect of

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[1] Dismissal of an appeal for want of a substantial question is a disposition on the merits. *Hicks v. Miranda,* 422 U.S. 332, 344 (1975).

depriving the appellant of all or substantially all of the beneficial use of his property. *Id.* at 755-758.

The object of the Setback was to promote the public's general welfare, health and safety. N.D.C.C. §24-01-01. The general welfare purposes of the Setback is akin to those for official mapping laws. The Setback is essentially an official map law that establishes widening lines (setbacks) within which utilities cannot be located without permission. As a land planning tool, the official map has been defined in the following way:

> "The official map technique permits [the state] to effect a present uncompensated reservation of land upon which it plans to construct future improvements. The map, which is adopted legislatively, designates certain areas for roads, (Footnote omitted). . . . The designation operates as a reservation only; title and possession remain with the owner, and the state pays no compensation unless and until actual condemnation proceedings are begun. (Footnote omitted.) The purpose of the reservation is to keep the land substantially open, and thus facilitate planning and ensure lower condemnation costs when and if the land is eventually taken. The [state] effectuates this purpose by either denying applications for building permits in the reserved area, or by providing that compensation will not be paid for subsequent improvements if the land is condemned. Most systems have a variance procedure for the landowner unable to receive a reasonable return on either the restricted parcel or the legal plot as a whole. (Footnote omitted.)
>
> When the official map sets aside land for roads, most courts agree that the regulation relates to a valid public objective of economy and planning. (Footnote omitted.)"

Freilich and Ragsdal, *Timing and Sequential Controls-The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region,* 58 Minn. Law Review 1009, 1062.

The cost of property acquired for public use is often greatly increased by the construction of improvements after it has been determined that the land will be needed for a future public use. In addition, construction of what amounts to relatively short-lived improvements on such land constitutes economic waste which benefits no one. This is exactly the result which intelligent land planning tools should prevent, since it leads to the necessity for subsequent removal of improvements at great cost to the public and confers little or no benefit to the landowner.

The objective (legitimate state interest) of mapping is to provide the machinery for intelligent land planning. *Headley v. Rochester,* 272 N.Y. 197, 5 N.E.2d 198, 199 (1936) (A portion of the plaintiff's land was included in a street as widened in a revised city map law. *Id.* at 199. Since the plaintiff had no plans for the use of his land located in the mapped area, and had not made application to the city for a permit, the mapping law had not deprived the plaintiff of anything. *Id.* at 201.) ; *State v. Manders,* 2 Wis.2d 365, 86 N.W.2d 469, 472 (1957) (A realtor purchased property that included land within the bed of a mapped street. *Id.* at 471. The realtor applied for a permit to build in the mapped zone, but was denied because he could not show that he would be substantially damaged by locating his building outside the mapped zone. *Id.* at 472.). There is little

doubt that an objective that seeks to achieve better planning is embraced within the concept of promoting the public's general welfare. *Manders,* 86 N.W.2d at 472. Intelligent land planning would be futile if the haphazard development and construction of structures in the bed of planned roadways occurred. *Headley,* 5 N.W.2d at 199. In meeting the possible inequitable results caused by the incumbrance on the use of private property and diminution in value, a permit to build in the mapped area must be provided if the private land was not yielding a fair return to the owner. *Headley,* 5 N.E.2d 200; *Manders,* 86 N.W.2d at 473. Consequently, a mapping law not only is reasonably related to a proper purpose of intelligent land planning, it does not deprive a property owner of the substantial use of his property because a permit must be granted if the property owner can show substantial damage.

The same analysis is applicable to the Setback. As with all mapping laws, the objective of the Setback is to promote orderly state and county highway planning and development so as to prevent the haphazard construction of utility lines which bear no relationship to future road widening. The North Dakota legislature's intent to have an adequate, integrated, safe, and efficient highway transportation system throughout the state is achieved through better highway planning. N.D.C.C. §24-01-01. The Setback allows the state to plan for safe and efficient highway transportation and anticipates inevitable future development of existing roads.

The Setback allows the highway commissioner to plan and expand rural highways to meet existing and

probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; and do so in accordance with minimum highway design standards. Widening rural highways benefits all rural residents by creating a road system more adept at safely and physically handling the new larger and heavier vehicles that seed, cultivate, harvest, and transport grain, cattle and other products from farm to market. Hence, planning for highway widening and improvement substantially benefits the public's welfare, health and safety.

The second objective of the Setback, as with mapping, is to protect the economic interests of the public. The objective of protecting the public's economic interest falls within the scope of promotion of the general welfare. *Manders,* 86 N.W.2d at 472. The North Dakota legislature's intent to promote economic and social progess of the state (N.D.C.C. §24-01-01) is achieved by economizing future widening or relocation of rural highways. The Setback protects the public from having to expend substantial sums of money on what are in effect relatively short-lived improvements.

In meeting with possible inequitable results caused by the Setback, the Setback gives the highway commissioner the power to consent to utility line construction within the Setback zone. GF-TW failed to even apply for a permit prior to constructing its utility line. Any deprivation to GF-TW was caused by its business decision, not by the Setback or highway commissioner. Consequently, the Setback not only is reasonably and substantially related to proper and legitimate state interests, it did not deprive GF-TW of the substantial

use of its property because the commissioner would have been required to issue a permit to GF-TW if it had requested a permit and shown that it would be substantially damaged if no permit was issued.

GF-TW acknowledges the constitutionality of mapping laws and cites *Maryland-Nat. Capital Park v. Chadwick,* 405 A.2d 241 (Md. App. 1979) and *Urbanizadora Versalles, Inc. v. Rivera Rios,* 701 F.2d 993 (1st Cir. 1983), as cases which acknowledge the proper use and limits of mapping laws. However, in both cases, unlike the Setback in this case, the mapping laws deprived the landowners of all reasonable use of their land, (*Chadwick,* 405 A.2d at 244; *Rivera Rios,* 701 F.2d at 998), and failed to provide a variance to landowners in equitable situations (*Chadwick,* 405 A.2d at 247; *Rivera Rios,* 701 F.2d at 998). Also, unlike the Setback, the reservations in *Chadwick* and *Rivera Rios* attached to the property after the landowner's acquisition of the property, and substantially affected the landowners use of the land, and the landowners ability to sell the land. (*Chadwick,* 405 A.2d at 243-244; *Rivera Rios,* 701 F.2d at 994-997.)

GF-TW reliance on *Nollan v. California Coastal Commission,* 483 U.S. ___, 107 S.Ct. 3141 (1987) is similarly misplaced. "In *Nollan,* the conditioning of a building permit upon Nollan's 'transfer to the public of an easement across their beach front property' (107 S.Ct. at 3143) was held to be a 'permanent physical occupation' (107 S.Ct at 3145) constituting a taking requiring compensation." *Grand Forks-Traill Water Users, Inc.,* 413 N.W.2d at 348. In *Nollan,* the land could not be used for anything other than an unprofitable public foot highway to the beach. As argued earlier,

the Setback is not a permanent physical occupation. The Setback merely regulates the placement of utility lines within the Setback Zone, but the landowner can farm, ranch, and otherwise use the land in typical rural North Dakotan ways that bring fair returns. Finally, the public easement (land regulation) in *Nollan* was attempted to be obtained by the state *after* the Nollan's acquired the property (or as a condition of their acquisition). *Id.* 3141. Conversely, and as it has been emphasized throughout this Motion to Dismiss or Affirm, the Setback was enacted and attached by law to the property *prior* to GF-TW acquiring its easements.

4. *Appellant contends that the Setback impermissibly imposes a detriment to a private property interest because it serves an enterprise rather than an arbitation function of state government.* The highway commissioner has previously argued that the Setback was enacted by the North Dakota legislature under its police power to regulate the use of property within the Setback Zone. As distinguised from eminent domain which requires compensation for taking property for public use, the Setback regulates property not for public use but to conserve the public's general welfare, safety and health. 16 Am.Jur.2d Constitutional Law, §365.

Contrary to GF-TW's argument, the Setback does balance the benefits and burdens arising from it's application. A utility line 80 feet or 105 feet from the center line of a rural state highway in North Dakota, at either distance, is on basically unimproved rural farm or ranch land. The setback does not apply to platted land. Whether a water utility line is at 80 feet or 105 feet it

will be buried at least below the frost line (6 to 8 feet) and will not disturb the use of the land for other use, such as farming or ranching. However, at 80 feet, the water utility line will likely be required to be relocated at the time of highway expansion. The cost of relocation will be to the public in paying for materials, equipment, and labor in relocating the existing utility (not to mention the material waste and disposal of nonreusable water utility line), to the water utilities customers for the interference and disruption of service, and to the utility line company in having to use its labor on a relocation project when it could work on other projects. Building the water line at 105 feet will result in none of these costs when highway expansion occurs. The fact is, construction of utility lines within the Setback area results in a relatively short-lived utility improvement which, in turn, constitutes an economic and material waste benefiting no one and burdening everyone.

III.

CONCLUSION

The appellant, GF-TW, cannot establish its standing to engage this Court's jurisdiction; the appellant's jurisdictional statement and the North Dakota Supreme Court decision do not present this Court with a substantial federal question to review and the appeal should be dismissed; or, based on the appellant's issues presented on appeal being so wanting in substance as to not need further argument, the North Dakota Supreme Court decision should be affirmed.

STEVEN F. LAMB
TERRY L. ADKINS, Counsel of Record
Assistant Attorneys General
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210
Attorneys for Appellee